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**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

**U.S. Citizenship  
and Immigration  
Services**



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Office: CALIFORNIA SERVICE CENTER

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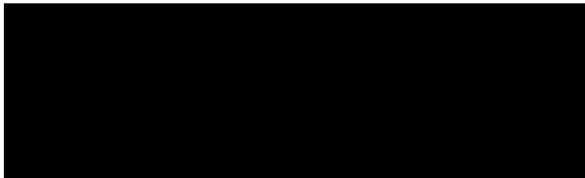
IN RE:

Petitioner:

Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, an Arizona limited liability company, states that it operates a business specializing in the export of U.S. products to the Middle East. It claims to be an affiliate of [REDACTED] located in Lebanon. The beneficiary was previously granted L-1A status for a period of one year, from August 2008 to August 2009, and the petitioner now seeks to extend his status for a period of two years so that he may continue to serve in the position of president.

The director denied the petition on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the petitioner has been doing business in the United States in accordance with the regulation; and (2) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the U.S. entity is doing business and that the beneficiary is serving in an executive capacity.

## **I. The Law**

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
  - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
  - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

One of the issues addressed by the director is whether the petitioner established that it is doing business in the United States, as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(H):

*Doing business* means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

## **II. The Issues on Appeal**

### **A. *Doing Business***

The first issue to be addressed is whether the petitioner established that the U.S. company is doing business in the United States in accordance with the regulations cited above.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 15, 2009. The petitioner is an Arizona limited liability company established in August 2007; it indicates that it is engaged in the export of U.S. products to the Middle East. The petitioner's initial supporting evidence included: (1) a letter of support from the petitioner; (2) a business plan for the petitioner; (3) the office lease for the petitioner; (4) financial and wire transfer documents for the petitioner; (5) a contract with [REDACTED] for the manufacture of an energy drink that will be exported to the Middle East along with evidence of payment for said contract; (6) State of Arizona Certificate of Trademark for a proprietary brand of cigarettes that will be

exported to the Middle East along with artwork for the brand and information on machinery to manufacture said cigarettes; (7) State of Arizona Certificate of Trademark for a proprietary brand of energy drinks that will be exported to the Middle East along with contracted artwork for the brand, evidence of payment for said artwork, and a contract for the materials to manufacture the energy drink; and (8) freight quotes from the U.S. to the Middle East for the energy drink.

The director issued a request for additional evidence ("RFE") on July 23, 2009. The director instructed the petitioner to submit copies of its 2008 federal income tax returns, along with all schedules and statements, and copies of any current valid business licenses for the city, county, state, etc.

In response to the RFE, the petitioner submitted a copy of its 2008 IRS Form 1065, U.S. Return of Partnership Income. The petitioner's IRS Form 1065 for 2008 indicates that the company reported a net income loss of \$164,041 for the year. The company's deductions included expenses for accounting, bank charges, marketing consultants, office expenses, telephone, travel, and other normal business expenses.

The petitioner also provided a copy of a [REDACTED] (AZ) Business, Occupational, and Professional License for the petitioner issued on December 29, 2008.

The director denied the petition on August 13, 2009, concluding that the petitioner failed to establish that the U.S. company is doing business as defined in the regulations. The director concluded that the petitioning company does not appear to be doing business because no sales were made for the entire year. The director also pointed out that the petitioner paid only \$23,070 in salaries and wages for 2008. The AAO notes that the beneficiary's initial petition was approved in August 2008 and he (and additional staff) did not commence work for the petitioner until December 2008.

On appeal, counsel asserts that the petitioner has been doing business by creating original products, protecting them (trademarks), producing them, and shipping them. Counsel states:

The business done included commissioning the production of a formal feasibility study; and the contracting and fulfillment of the contracts for creating and patenting of the [REDACTED], and [REDACTED]; sourcing and contracting with a US manufacturer for the energy Drink; and putting in place the licenses, names, and other registration necessary to commence production, sales and shipment of the first protected product to be exported to the Middle East. This took one year as well it should. The product is now being manufactured in [REDACTED] by the contracted manufacturer.

Counsel also submits a Certificate of Free Sale from the State of New Jersey for the petitioner's manufacture of an energy drink and multiple invoices and shipping receipts for the sale of the energy drink in the Middle East.

Upon review, the evidence in the record persuasively establishes that the petitioner is engaged in the regular, systematic and continuous provision of goods and/or services in the United States. While the petitioner did not begin selling its products until 2009, the evidence shows that the petitioner developed two proprietary products, contracted the manufacture of said products, and engaged in the sale of those products in the Middle East. The petitioner only needs to establish that its provision of goods or services is regular, systematic and continuous. The evidence is sufficient to meet the petitioner's burden.

Accordingly, the AAO will withdraw the director's determination with respect to this issue as the petitioner has overcome this ground for denial.

***B. Employment in a Managerial or Executive Capacity***

Although the director's determination with respect to the above ground will be withdrawn, the AAO finds insufficient evidence in the record to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner stated on the Form I-129 that the beneficiary will be employed by the U.S. entity as president. The petitioner indicated that it is operating a business specializing in the export of U.S. products to the Middle East with two employees.

The petitioner stated that the beneficiary performs the following duties:

As President in L-1A status, [the beneficiary] will oversee management, establish goals and policies for the U.S. company, exercise wide latitude of discretion in decision making matters, and receive supervision only from the Board of Directors. As more staff is needed [the beneficiary] will also be responsible for approving the hiring and firing of personnel. He will be responsible for maintaining ties with the affiliate company, developing relationships with various prospective clients and review of all business contracts.

His specific job duties include:

- Review all business trade contracts for quality and ensure exportation of U.S. products to the Middle East
- Manage new corporate customers by studying business opportunities related to the mission of [the petitioner] in the U.S.
- Reviews all business plans and feasibility studies
- Reviews all business financing contracts
- Control and manage the time table and cash flow of business opportunities and make adjustments as needed

The petitioner did not submit any additional information describing the duties of the beneficiary on a day-to-day basis. The petitioner made the following statements about the beneficiary's subordinates' job duties:

Vice President [REDACTED] is in charge of the day to day operations of the company, hiring and firing of personnel, and is in charge of the real estate development construction projects. This in turn frees [the beneficiary] for higher level executive duties. [The petitioner] also employs [REDACTED] as Commercial Manager in charge of executing the decisions of the President in matters related to commercial issues and following up with U.S. corporations for export to the Middle East and organizing

shipping schedules. The company currently has a position open for a receptionist and the company is looking for someone to fill that position.

The petitioner submitted an organizational chart for the U.S. company listing the beneficiary as President, [REDACTED] as "VP and Real Estate Responsible", [REDACTED] as Commercial Manager, and one vacant subordinate position titled Receptionist.

The director issued a request for additional evidence ("RFE") on July 23, 2009, instructing the petitioner to submit, *inter alia*, the following: (1) the total number of employees at the U.S. location where the beneficiary will be employed; (2) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees he supervises by name and job title, including a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision; and (3) a more detailed description of the beneficiary's duties in the U.S., specifically indicating the percentage of time the beneficiary spends on each of the listed duties.

In response to the RFE, the petitioner submitted a new organizational chart for the U.S. company explaining that [REDACTED] the former "VP and Real Estate Responsible," was no longer employed by the petitioner. The new organizational chart lists the beneficiary as President, [REDACTED] as Vice President/Commercial and Operations Manager, and [REDACTED] as Receptionist/Secretary.

The petitioner also submitted a description of the subordinate's job duties as follows:

**Vice President/Commercial Operations Manager** – [REDACTED] is experienced in office management in the small business development area particularly in Real Estate and Brokerage.

Her educational background includes: Real Estate School, Computer Classes, Accounting Classes and Management Education Classes.

As Vice President/Commercial Operations Manager her detailed job duties include:

Overseeing all of the day to day production, accounting and also assists [the beneficiary] with all the work it takes to run a company.

[REDACTED] earns a yearly salary of \$42,000

**Receptionist/Secretary** – [REDACTED] a U.S. citizen is an experienced receptionist/secretary with five (5) years of experience. Her educational background includes: AA degree in advertising design.

As Receptionist/Secretary her job duties include: answering phones, design publications, general office duties and an assistant to [the beneficiary] and [REDACTED].

[REDACTED] is paid \$11.00 per hour for her services.

The petitioner then submitted a list of the beneficiary's detailed job duties:

As President [the beneficiary's] job duties are as follows:

Review all business trade contracts for quality and ensure exportation of U.S. products to the Middle East – [the beneficiary] reviews specification of products, prices, international

regulations of commerce. [The beneficiary's] ultimate goal is to have his U.S. company benefit from his entire decision making.

Percentage of time spent 80%

Manage new corporate customers by studying business opportunities related to the mission of [the petitioner] in the U.S. – [the beneficiary] researches the backgrounds of many companies to see if there are any advantages to his U.S. Company.

Percentage of time spent 5%

Reviews all business plans and feasibility studies – [the beneficiary] reviews all of the business plans of the companies he is interested in working with.

Percentage of time spent 5%

Reviews all business financing contracts – [the beneficiary] approves all of the financing since he is the principal and main shareholder.

Percentage of time spent 5%

Control and manage the time table and cash flow of business opportunities and make adjustment as needed – [the beneficiary] is in charge of all of the financial decisions of the company and is always up to date on the cash flow of the company.

Percentage of time spent 5%

The director denied the petition on August 13, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition.

In support of the appeal, counsel submits a brief in which she asserts that the beneficiary serves and will continue to serve in an executive capacity. Counsel specifically states:

The specific **duties** performed by the President as described in his job description and his letter were directed toward contracting the creation, protection, sale and production of that product for shipment throughout the Middle East. This plan is feasible, as he has concluded his studies and has the funding and contacts through his lengthy business history to make it work.

[The beneficiary] was not flipping burgers, typing letters, making sales calls, answering the phones or stuffing envelopes. He was back and forth from the U.S. to Lebanon for the first year, and is currently in Lebanon sourcing distributors for the energy drink. He is an **executive** in every sense of the word.

All routine **commercial and internal operations** have been and are now being performed on a day to day (according to her, 24 hour basis) by U.S. Citizen [REDACTED] until production of the sports drink increases in volume, justifying the hire of more commercial and operations employees to assist her. Note that it is [REDACTED] name which appears on such documents as the freight quotations, art approval forms, etc. She will be responsible for the interview and hire of employees, with the authority vested in her by [the beneficiary]. The day to day ministerial projects have been undertaken by the US citizen Receptionist/Secretary



Also starting September 8, 2009 U.S. citizen [REDACTED] commence employment with the company and she will be responsible for assisting [the beneficiary] and [REDACTED]. Her job duties will consist of promoting the company's new product by contacting distributors outside of the U.S. Also will perform day to day activities in the office, make and answer calls regarding the company's products and introduce new products that the company is working on. [REDACTED] will work along side [REDACTED] and assist with current projects.

The petitioner submits a new organizational chart for the U.S. company listing the beneficiary as President, [REDACTED] as Vice President and Commercial Department Manager, [REDACTED] as Assistant Commercial Department, [REDACTED] as Administrative Assistant, one vacant subordinate position titled Sales Representative United States, one vacant subordinate position titled Sales Representative Europe, and one vacant subordinate position titled Sales Representative Middle East and Africa.

#### *Discussion*

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that, "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the startup of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or

executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, or is otherwise not sufficiently operational, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its owner and president. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The petitioner and counsel provided several statements on the beneficiary's duties. In the percentage breakdown of the beneficiary's duties, the petitioner describes the beneficiary's duties in very broad terms, noting he will "[r]eview all business trade contracts for quality and exportation of U.S. products to the Middle East – 80%," "[m]anage new corporate customers by studying business opportunities related to the mission of

[the petitioner] in the U.S. – 5%," "[r]eviews all business plans and feasibility studies – 5%," "[r]eviews all business financing contracts – 5%," and "[c]ontrol and manage the time table and cash flow of business opportunities and make adjustment as needed – 5%." The petitioner did not provide sufficient detail for each of the duties indicated above, specifically the one duty that the beneficiary spends 80% of his time performing. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the initial filing of the petition, the petitioner described the beneficiary's job duties by stating, "[a]s President . . . [the beneficiary] will oversee management, establish goals and policies for the U.S. company, exercise wide latitude of discretion in decision making matters, and receive supervision only from the Board of Directors." These duties merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his time on non-qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted a proposed

organizational chart on appeal depicting two tiers of proposed managerial employees supervising a staff of one assistant commercial department, administrative assistant, and three potential sales representatives, the petitioner has not shown how the subordinate employees would free him from non-qualifying operational duties. The petitioner specifically stated that the Vice President/Commercial Operations Manager would "[o]verse all of the day to day production, accounting and also assist [the beneficiary] with all the work it takes to run a company." Such a statement is not sufficient to explain the non-qualifying job duties that the subordinate is freeing the beneficiary from performing. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The three organizational charts submitted by the petitioner are relatively consistent. The organizational chart submitted on appeal, however, lists one additional employee not previously employed at the time of filing the petition and three pending hires. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The beneficiary in this matter has not been shown to be employed in a primarily managerial or executive capacity under the extended petition. The AAO will uphold the director's determination that the petitioner has not grown to the point where the beneficiary is primarily engaged in managerial or executive duties. Accordingly, the appeal will be dismissed.

### III. Qualifying Relationship

Beyond the decision of the director, the record does not definitively establish that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner submitted two stock certificates with the filing of the petition: one stock certificate numbered [REDACTED] stating that the beneficiary owns 70 units of the U.S. company, and a second stock certificate numbered [REDACTED] stating that [REDACTED] owns 30 units of the U.S. company. On July 21, 2009, counsel for the petitioner

submitted a letter amending the petition and stating, "[t]he current ownership of the petitioner is 100% by [the beneficiary]. [REDACTED] architect, is no longer involved in ownership or employment by [the petitioner]." A stock ledger or new stock certificates were not submitted as evidence of ownership of the petitioning entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity, particularly if there is evidence that multiple stock certificates have been issued. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has adequately demonstrated that a qualifying relationship exists between the petitioner and the foreign entity. For this additional reason, the petition may not be approved.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

#### **IV. Conclusion**

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.